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Supreme Court, U.S.
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Supreme Court of the United States

CORLISS O. BURANDT,

Petitioner,

—v.—

JON W. DUDAS, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ALLIANCE ON MENTAL ILLNESS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Court Should Grant Review to Reaffirm Fundamental Protections for the Rights of People With Mental Illnesses 3

II. The Federal Circuit Failed to Protect Mr. Burandt's Rights By Arbitrarily Disregarding His Mental Illnesses 9

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE(S)

CASES

Addington v. Texas,
441 U.S. 418 (1979) 4, 5

Atkins v. Virginia,
536 U.S. 304 (2002) 4

Cooper v. Oklahoma,
517 U.S. 348 (1996) 4

Heller v. Doe,
509 U.S. 312 (1993) 4, 16

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999) 3, 4

Pannetti v. Quarterman,
127 S. Ct. 2842 (2007) 4

In re Patent No. 4,835,883, Paper No. 17
(Comm'r Pat. Jan. 29, 1999) 13

Planing-Machine Co. v. Keith,
101 U.S. 479 (1880) 17

Ray v. Lehman,
55 F.3d 606 (Fed. Cir. 1995) 18

Smith v. Goodyear Dental Vulcanite Co.,
93 U.S. 486 (1877) 17

Smith v. Mossinghoff,
671 F.2d 533 (D.C. Cir. 1982) 18

Star Fruits v. United States,
393 F.3d 1277 (Fed. Cir. 2005) 19

STATUTES

5 U.S.C. § 706(2)(A) 9

OTHER

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disability/professionals/bluebook/12.00
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Anxiety: When and How to Treat*
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INTEREST OF *AMICUS CURIAE*[1]

The National Alliance on Mental Illness ("NAMI") is the nation's largest grassroots organization dedicated to improving the quality of life of people living with serious mental illness and their families. Founded in 1979, NAMI has more than 1,100 affiliates in all 50 states and the District of Columbia. A significant component of NAMI's mission is to combat pervasive stigma and discrimination towards people with serious mental illnesses in all facets of life. NAMI seeks in this case to ensure that the effects of disabling mental illnesses are accurately and fairly considered in determining whether delays in the payment of maintenance fees to the U.S. Patent and Trademark Office constitute unavoidable delay in accordance with long-standing Supreme Court precedent.

SUMMARY OF ARGUMENT

Amicus curiae submits this brief to highlight the injustice that results when the existence of a debilitating mental illness is ignored or not fully appreciated by government agencies and the courts. As set forth below, the

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[1] Counsel of record for Petitioner and Respondent were timely notified of the intent to file this brief under S. Ct. R. 37.2(a) and have consented to its filing; their consent letters have been filed with the Clerk of the Court. No counsel for a party in this Court authored this brief, in whole or in part, and no party in this Court or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

determination by Respondent U.S. Patent and Trademark Office ("USPTO") – that Petitioner Corliss O. Burandt's delay in paying the requisite maintenance fees on his patent was not "unavoidable" – disregarded documented medical evidence of Mr. Burandt's incapacitating mental illness, coupled with his extreme poverty. Moreover, the erroneous decision by the Federal Circuit – concluding that Mr. Burandt's mental illness was both "irrelevant" and insufficient to merit reinstatement of his patent – sets a perilous precedent for disregarding the rights of people living with mental illnesses.

Justice requires society as a whole, and the Government in particular, to vigilantly safeguard the rights of people suffering from debilitating mental illnesses. Otherwise, the stigma frequently associated with mental illnesses will persist, and the rights of people suffering from such illnesses will be impermissibly and unnecessarily undermined.

Mr. Burandt has been unjustly deprived of his property rights due to uninformed and stigmatizing views of mental illnesses, which warrants judicial review so that these injuries can be remedied.

ARGUMENT

I. The Court Should Grant Review to Reaffirm Fundamental Protections for the Rights of People With Mental Illnesses

People living with mental illnesses should be treated fairly and properly protected, without resort to uninformed assumptions or decisionmaking. This fundamental principle has become deeply rooted in our administrative and legal systems. Over the past thirty years, this Court has continued to extend protections for people with mental illnesses.

For example, in *Olmstead v. L.C. ex rel. Zimring*, this Court construed the anti-discrimination provision contained in the public services portion of the Americans with Disabilities Act ("ADA") to afford individuals with mental disabilities the opportunity to be placed in community settings rather than in institutions, ruling that undue institutionalization amounted to discrimination by reason of disability. *See* 527 U.S. 581, 596-607 (1999).[2] The Court required States to provide community-based treatment for people with mental disabilities after consideration of various individualized factors, as opposed to an arbitrary decision based upon broad

[2] The plaintiffs in *Olmstead* both suffered from mental retardation, and one had also been diagnosed with schizophrenia and the other with a personality disorder. *See id.* at 593. These conditions undeniably qualify as disabilities under the ADA. *See id.* at 589 n.2.

generalizations or stereotypical assumptions about their conditions. *See id.*

This Court has also repeatedly held that people living with mental illnesses should neither be tried for crimes nor put to death where they do not have the requisite competency. *See, e.g.*, *Pannetti v. Quarterman*, 127 S. Ct. 2842, 2862 (2007) (reinforcing the Eighth Amendment prohibition on executing people with mental illnesses and holding that the state court deprived petitioner of due process by failing to adequately consider his "submission [ ] that he suffers from a severe, documented mental illness"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting execution of individuals suffering from mental retardation); *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (reinforcing the fundamental principle that mental illness prohibits trial of a defendant where such illness rises to the level of incompetence).

This Court has further recognized the complexities of mental illness and the need to adequately and fairly protect the rights of people with mental illnesses in the context of involuntary commitments. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 322-30 (1993) (upholding Kentucky's requirement for a higher burden of proof for the commitment of people living with mental illnesses); *Addington v. Texas*, 441 U.S. 418, 426-27 (1979) (holding that the burden of proof for commitment of people with mental illnesses must be greater than the preponderance of evidence standard).

The rationale underlying this Court's enlightened sensitivity towards people with mental illnesses is to protect those individuals where they would otherwise be subject to unjust consequences or circumstances. As this Court has noted, "one who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma" and is often forced to suffer "adverse social consequences." *Addington*, 441 U.S. at 429, 426.

Therefore, an arbitrary determination by a government agency as to the validity and/or severity of an individual's mental illness, as was the case for Mr. Burandt, is particularly problematic because these types of determinations will almost assuredly result in a deprivation of rights. Instead of protecting people with mental illnesses, an arbitrary determination as to the nonexistence of a mental illness – irrespective of medical evidence to the contrary – undeniably subjects people with mental illnesses to unjust consequences and permits government entities to perpetuate the historical stigmas associated with mental illnesses. People living with mental illnesses do not seek special or additional protection. To the contrary, the fundamental principle at stake for Mr. Burandt and others who live with mental illnesses is fair treatment under the laws by having government agencies and the courts thoroughly appreciate and consider the relevant facts relating to the mental illnesses with which they live.

The 2001 World Health Organization report on mental health aptly noted that "Governments have a responsibility to give priority to mental health," and that, in doing so, "[t]he single most important barrier to overcome in the community is the stigma and associated discrimination towards persons suffering from mental and behavioural disorders." THE WORLD HEALTH ORGANIZATION, THE WORLD HEALTH REPORT 2001: MENTAL HEALTH: NEW UNDERSTANDING, NEW HOPE, 98, 107 (2001) [hereinafter "WHO REPORT"], *available at* http://www.who.int/whr/2001/en/whr01_en.pdf, last visited January 4, 2009. "Stigma erodes confidence that mental disorders are valid, treatable health conditions . . . [and] tragically deprives people of their dignity[,] interfer[ing] with their full participation in society." *Id.* at 16 (quoting U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS), MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL – EXECUTIVE SUMMARY (1999)).

Moreover, because recent research indicates that mental illness has become increasingly widespread, it is all the more important that the Government establish proper procedures and conduct thorough inquiries to ensure that people with mental illnesses are properly protected in the future.

> Mental and behavioural disorders are common, affecting more than 25% of all people at some time during their lives. They are also

> universal, affecting people of all countries and societies, individuals at all ages, women and men, the rich and the poor, from urban and rural environments. . . . Mental and behavioural disorders are present at any point in time in about 10% of the adult population. Around 20% of all patients seen by primary health care professionals have one or more mental disorders. One in four families is likely to have at least one member with a behavioural or mental disorder. These families not only provide physical and emotional support, but also bear the negative impact of stigma and discrimination.

Id. at 19. Anxiety disorders – like the ones suffered by Mr. Burandt, which cause debilitating feelings of fear, worry, and uncertainty – affect approximately 40 million American adults, or about 18% in any given year. *See* NATIONAL INSTITUTES OF HEALTH, ANXIETY DISORDERS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 1 (2007), *available at* http://www.nimh.nih.gov/health/publications/anxiety-disorders/summary.shtml, last visited January 3, 2009.

The lack of sensitivity exhibited by government agencies and the courts concerning the rights of people with mental illnesses necessarily creates an undue burden on affected individuals. In particular, "[t]here is also evidence that the course of [mental] disorders is

determined by the socioeconomic status of the individual," such that poverty exacerbates mental illness where there are barriers to accessing care. WHO REPORT at 40. Accordingly, those individuals with the least economic means who also suffer from a mental illness – like Mr. Burandt here – are forced to shoulder the unjustified burden of bringing an Administrative Procedures Act ("APA") proceeding to vindicate their rights. This hurdle is undoubtedly too difficult for many to overcome. Moreover, compelling people with mental illnesses to bring suit is inefficient, taxes the judicial system, and delays the administration of justice.

In short, this case has far-reaching implications. Mr. Burandt's unfortunate circumstances are merely one example of the significant barriers that people living with mental illnesses face in negotiating the administrative and legal systems. Permitting government agencies and the courts to arbitrarily determine the validity and/or severity of a mental illness fails to protect the growing numbers of Americans with mental illnesses, perpetuates unwanted stigma, and places an undue burden on people with mental illnesses who have been unjustly deprived of their rights.

Given the prevalence of mental illnesses, government agencies and the courts need to ensure that adequate protections exist to safeguard the rights of affected individuals. These protections apply not only in the context of criminal cases or involuntary commitment

proceedings, but also in the context of everyday civil matters. This case affords the Court with the opportunity to reaffirm this country's fundamental adherence to protecting individual rights, while addressing an important question under the U.S. patent laws.

II. The Federal Circuit Failed to Protect Mr. Burandt's Rights By Arbitrarily Disregarding His Mental Illnesses

The APA standard of review provides courts with broad latitude to "hold unlawful and set aside" those "agency action[s], findings, and conclusions" that are not only "found to be arbitrary, capricious, [and] an abuse of discretion," but also those that are "*otherwise not in accordance with the law.*" 5 U.S.C. § 706(2)(A) (emphasis added). Here, the Federal Circuit did not consider any number of significant facts regarding Mr. Burandt's mental illnesses. Further, the court made several unwarranted assumptions by failing to acknowledge the debilitating effects of his mental illnesses and determining that the diagnosed conditions were insufficient to merit reinstatement of his patent. By endorsing the erroneous rulings of the USPTO and the District Court, the Federal Circuit effectively sanctioned government disregard of Mr. Burandt's serious mental illnesses.

Most notably, the Federal Circuit concluded that, "[a]lthough the facts surrounding Burandt's situation are no doubt unfortunate, they are irrelevant. . . ." App. 14. The court

based this determination on the fact that the USPTO and the District Court had both "considered Burandt's financial status and mental condition, but found no evidence in the record to show that, despite his condition, he could not have inquired into the status of his patent during the eleven years between the patent's issuance and his discovery of its expiration in 2001." *Id.* However, this ruling completely ignored Mr. Burandt's debilitating conditions by failing to appreciate that *any inaction on his part was directly attributable to his mental illnesses.*

The record reveals that Mr. Burandt suffered from at least three serious conditions – Generalized Anxiety Disorder, Histrionic Personality Disorder, and Attention-Deficit/Hyperactivity Disorder – all of which rendered him completely disabled since before 1992, *i.e.*, before the first maintenance payment on his patent was due. *See id.* at 55-56; *id.* at 68-70 (Warner Decl. ¶¶ 2-5). However, the Federal Circuit (as well as the USPTO and the District Court) failed to address the mental and/or physical effects these disorders have on affected individuals like Mr. Burandt.

For example, the court failed to recognize that individuals suffering from Generalized Anxiety Disorder ("GAD") often have trouble focusing on routine tasks and often are not stable enough to hold a job due to constant worry.

> The essential feature of Generalized Anxiety Disorder is

> excessive anxiety and worry (apprehensive expectation), occurring more days than not for a period of at least 6 months, about a number of events or activities. . . . The person finds it difficult to keep worrisome thoughts from interfering with attention to tasks at hand and has difficulty stopping the worry. Adults with Generalized Anxiety Disorder often worry about everyday, routine life circumstances such as possible job responsibilities, finances, the health of family members, misfortune to their children, or minor matters. . . . During the course of the disorder, the focus of worry may shift from one concern to another.

AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th rev. ed. (2000) at 472-73. Thus, Mr. Burandt's inability to hold down a job is indicative of how his anxiety-prone condition so consumed him that he could not perform seemingly routine tasks, let alone focus on the intricacies of complying with the patent laws and regulations to maintain his patent.

In addition, the court failed to consider whether Mr. Burandt had suffered from any physical symptoms that might have made it

impossible for him to inquire into the status of his patent. In particular, individuals suffering from GAD often have prolonged muscle tension, trembling, twitching, shakiness, or muscle aches/soreness that disrupt normal functioning. *Id.* at 473. GAD also causes somatic symptoms – including sweating, nausea, and diarrhea – and depressive symptoms. *Id.* These physical symptoms would have interfered with Mr. Burandt's ability to appropriately attend to the maintenance of his patent.

Significantly, the court further failed to appreciate that Mr. Burandt had been diagnosed with having at least three co-existing mental illnesses. In particular, "[a]nxiety and depressive disorders commonly occur together," and comorbidity of these two disorders can have an increased debilitative effect on individuals. WHO REPORT at 37. While the record does not disclose whether Mr. Burandt also has a depressive disorder, "comorbidity is found among about half of all the individuals with these disorders" and would result in "serious implications for the identification, treatment and rehabilitation of [Mr. Burandt as an] affected individual[ ]." *Id.*; *see also* Robert H. Howland, MD and Michael E. Thase, MD, *Comorbid Depression and Anxiety: When and How to Treat* (August 2005), reprinted in Vol. 6158:18 of THE JOURNAL OF PSYCHIATRY, 2271-2493, *available at* http://www.medical-library.org/j_psych/depression_and_anxiety.htm, last visited January 3, 2009 ("Accumulating evidence indicates that patients with comorbid depression and anxiety tend to have greater

illness severity and a lower treatment response than those with either disorder alone. In addition, social function and quality of life are more greatly impaired.").

The Federal Circuit additionally failed to consider how the side effects of medications used to treat Mr. Burandt's conditions might affect his ability to take action to ensure compliance with the statutory maintenance requirements. For example, individuals suffering from GAD are often prescribed Benzodiazepines, which may cause unsteadiness, drowsiness, reduced muscle coordination, and problems with balance. *See* THE MAYO CLINIC, GENERALIZED ANXIETY DISORDER, MAYO FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH (MFMER) (Sept. 11, 2007), *available at* http://www.mayoclinic.com/health/generalized-anxiety-disorder/DS00502/DSECTION=treatments%2Dand%2Ddrugs, last visited January 8, 2009. These would have undoubtedly had a negative impact on Mr. Burandt's ability to maintain his patent.

Moreover, because higher doses and long-term use of Benzodiazepines can also cause memory problems, *see id.*, these side effects more than likely affected Mr. Burandt's ability to monitor his patent. *See, e.g., In re Patent No. 4,835,883*, Paper No. 17, at 4 (Comm'r Pat. Jan. 29, 1999) (indicating that evidence demonstrating that the inventor was under the influence of drugs, which affected his memory and his capacity to pay and/or remind another inventor to

pay the requisite maintenance fee, would have resulted in a finding of unavoidable delay).

Yet, neither the USPTO nor the courts even attempted to inquire into whether Mr. Burandt's symptoms or medications rendered him incapable of taking the necessary steps to maintain his patent. Instead, they simply faulted him for his inaction.

Indeed, the Federal Circuit found that Mr. Burandt's mental illness was "irrelevant" in the face of clear evidence that he was "completely disabled and due to his condition has not been in a condition to hold a job" since before 1992. App. 55; *id.* at 69 (Warner Decl. ¶ 3). This conclusion is particularly troubling when viewed in light of the fact that another, separate government agency had previously determined that Mr. Burandt was sufficiently disabled to warrant Social Security Disability Income.[3]

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[3] The Social Security Administration determined that Mr. Burandt met the following standard: "The evaluation of disability on the basis of mental disorders requires documentation of a medically determinable impairment(s), consideration of the degree of limitation such impairment(s) may impose on the individual's ability to work, and consideration of whether these limitations have lasted or are expected to last for a continuous period of at least 12 months." DISABILITY EVALUATION UNDER SOCIAL SECURITY, Listing of Impairments – Adult Listings: 12.00 Mental Disorders (Blue Book- September 2008), *available at* http://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm, last visited January 4, 2009.

Perhaps most disconcerting is the Federal Circuit's endorsement of the assumption repeatedly made by the USPTO and the District Court that Mr. Burandt cannot possibly have been incapacitated because he was able to write letters to Congress and auto manufacturers. *See* App. 14, 35-36, 102. Under this stark view, Mr. Burandt's illnesses must either be so debilitating that he is incapable of functioning in any way, or else, he cannot actually be disabled. However, mental illness and incapacitation sufficient to meet the unavoidable delay standard are plainly not inconsistent with being able to compose and send a letter.

The USPTO even failed to apply its own standard that Mr. Burandt's delay be "of such a nature and degree as to render petitioner unable to conduct business (e.g., correspond with the Office)." *Id.* at 101-02. This standard is, of course, quite distinguishable from being able to write simple letters pleading for assistance. Indeed, Mr. Burandt's treating physician, Dr. Paul Warner, stated that he did not believe his patient was capable of either prosecuting his patent application or undertaking petition proceedings on his own due to his condition. *See id.* at 69 (Warner Decl. ¶ 5). But the USPTO, while acknowledging that a showing under its own standard "must be supported by a statement from the petitioner's treating physician," that "provide[s] the nature of petitioner's incapacitation," *id.* 102, then proceeded to completely discount Dr. Warner's diagnosis and conclusions, *see id.* *See also id.* at 122 (USPTO

stating that it "does not dispute Mr. Burandt's medial diagnosis, and does not substitute its judgment for that of a physician," but nonetheless concluding that the unavoidable delay standard had not been met based upon facts *other than* Mr. Burandt's mental illnesses). At bottom, the USPTO and the courts effectively disputed Dr. Warner's medical diagnosis, questioning its veracity without a complete consideration of the facts and circumstances. *See id.* at 14 ("We conclude that the district court did not err when it considered and rejected the evidence relating to Burandt's *purported* mental disability and destitution.") (emphasis added); *accord id.* at 35-36, 101-02, 121-22.

Such conduct sets a dangerous precedent by effectively permitting government agencies and the judicial system to simply nullify the existence of serious and incapacitating mental illnesses because an individual is neither comatose nor mentally retarded. *See, e.g., Heller v. Doe*, 509 U.S. 312, 321-24 (1993) (discussing the differences between people living with mental illnesses and people who suffer from mental retardation). It also perpetuates the stigma associated with mental illnesses that this Court has recently sought to eradicate.

In that regard, the Federal Circuit's reasoning is in tension with both this Court's precedent and Congressional intent underlying the patent maintenance fee statute. In *Smith v. Goodyear Dental Vulcanite Co.*, this Court held that an eight-year delay in prosecuting a patent

application was "unavoidable" because the inventor suffered from "extreme poverty" and "ill-health." 93 U.S. 486, 491 (1877). Similarly, in *Planing-Machine Co. v. Keith*, this Court again stated that "extreme poverty of the applicant, or protracted sickness" are both "ordinary and accepted reasons" for unavoidable delay. 101 U.S. 479, 485-86 (1880). Moreover, in enacting 35 U.S.C. § 41, Congress sought "to avoid the inequitable loss of patent rights." H.R. Rep. No. 97-542 at 8 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 765, 772. Here, failing to account for Mr. Burandt's mental illnesses improperly removed him (and other people living with mental illnesses) from the purview of the statute. Simply put, the Federal Circuit's decision effectively renders the loss of patent rights inequitable only for people who are not affected by a mental illness.

The Federal Circuit also improperly imposed the "reasonably prudent person" standard upon people with mental illnesses when it determined that Mr. Burandt had failed to "exercise sufficient diligence to satisfy the unavoidable delay standard." App. 8. Specifically, the Federal Circuit followed the standard it had previously set forth in *Ray v. Lehman*, 55 F.3d 606 (Fed. Cir. 1995), which held that, "in determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person." *Id.* at 9 (quoting *Ray*, 55 F.3d at 609). Thus, in the court's view,

there was no evidence that Mr. Burandt was incapable of "inquir[ing] into the status of his patent during the eleven years between the patent's issuance and his discovery of its expiration in 2001." *Id.* at 14.

However, this conclusion improperly assumed that Mr. Burandt was, in fact, capable of acting as a "reasonably prudent person," and that he could have actually exercised "due care." Yet, mental illness, its physical manifestations, and the side effects of its treatments all drastically alter the abilities of individuals and impair their functioning. As such, the court failed to appreciate that the unavoidable delay standard from *Ray* could not be directly applied to someone like Mr. Burandt, but, rather, would need to be adapted to account for individuals suffering from a mental illness.

In imposing that standard upon Mr. Burandt, the Federal Circuit failed to consider the totality of his circumstances. *See Smith v. Mossinghoff*, 671 F.2d 533, 538 (D.C. Cir. 1982) (holding that whether a delay is unavoidable is a case-by-case determination, taking all of the facts and circumstances into account). The court did not weigh how the combination of mental illnesses and extreme poverty affected Mr. Burandt. For example, the court did not consider whether poverty in any way exacerbated Mr. Burandt's mental illnesses and his ability to inquire into the status of his patent, either due to difficulties in accessing care or an inability to pay

for necessary treatments. *See, e.g.*, WHO REPORT at 40.

In sum, the Federal Circuit failed to recognize the vulnerabilities of, and the need to protect, the interests of Mr. Burandt as a person diagnosed with mental illnesses. Specifically, the court disregarded the effects of Mr. Burandt's mental illnesses (and any medications taken in an effort to treat such illnesses) and, therefore, ignored the possibility that any inaction on Mr. Burandt's part may be wholly attributable to his mental illnesses or the side effects of any treatments he was receiving. The record demonstrates that the USPTO and the courts based their decisions upon erroneous interpretations of the facts, resulting in an "unreasonable judgment in weighing relevant factors." *Star Fruits v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005). This Court should grant review to address these numerous failings.

CONCLUSION

For the foregoing reasons and the reasons presented by Mr. Burandt, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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